Supreme Court, U.S.
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No.

In the Supreme Court of the United States

ORRIE MCNEILL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Whether the Third Circuit so far departed from the accepted and usual course of judicial proceedings by failing to address arguments raised by Petitioner that a search occurred before the issuance of a search warrant?

Table of Contents

Questions Presented ii

Table of Contents ii

Table of Cited Authorities v

Parties to the Action Below 1

Opinions Below 1

Statement of Jurisdiction 1

Constitutional Provisions and Policy 3

Statement of the Case 4

Proceedings Below 8

Reasons for Granting the Writ 11

1. The Third Circuit So Far Departed from the Accepted and Usual Course of Judicial Proceedings by Failing to Address Petitioner's Argument that a Search Occurred before the Issuance of the Search Warrant. 11

a. The Third Circuit Erred when it Failed to Address Petitioner's Argument that the Kilogram of Heroin was not in Plain View. 13

„kb. The Third Circuit Erred when it Failed to Address Petitioner's Argument that the Officers were Aware of the Kilogram of Heroin before the Search Warrant Issued. 15

Conclusion 19

Table of Cited Authorities

Cases

Agathos v. Starlite Motel, 977 F.2d 1500 (3d Cir. 1992) 11

Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985) 11

Blue Bird Food Products Co. v. Baltimore & O.R. Co., 474 F.2d 102 (3d Cir. 1973) 12

Brigham City v. Stuart, 547 U.S. 398 (2006) 10

Concrete Pipe and Products of C.A, Inc. v. Constr. Laborers Pension Trust for S. C.A., 508 U.S. 602 (1993) 11

Hoffa v. U.S., 385 U.S. 293 (1966) 10

Ornelas v. U.S., 517 U.S. 690 (1996) 11

Pullman-Standard v. Swint, 456 U.S. 273 (1982) 11

Rochez Bros., Inc. v. Rhoades, 527 F.2d 880 (3d Cir. 1975) 11

Statutes

18 U.S.C. § 924 8

21 U.S.C. § 841 8

28 U.S.C. § 1254(1) 1

Fourth Amendment to the United States Constitution 2, 11

Rules

Federal Rule of Criminal Procedure 29(c) 9, 10

Federal Rule of Criminal Procedure 33 9

Supreme Court Rules 13.1 1

Tables of Appendices

Appendix A – Order of the United States Court of Appeals for the Third Circuit Dated and Decided December 12, 2008 ..... a2

Appendix B – Opinion of the United States Court of Appeals for the Third Circuit Dated August 5, 2008 ..... a4

Appendix C – Opinion of the United States District Court Dated March 29, 2006 ..... a45

Parties to the Action Below

All parties are contained in the caption.

Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit and the District Court's opinion are unreported.

Statement of Jurisdiction

The United States Court of Appeals for the Third Circuit issued its panel decision on August 5, 2008. Petitioners sought for a rehearing on August 15, 2008, which request was denied by the Court on December 12, 2008. The present petition for writ of certiorari is timely filed pursuant to Supreme Court Rules 13.1 and 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1) to grant a petition for writ of certiorari, filed by a party to a federal criminal

case, to review the judgment of a federal court of appeals.

Constitutional Provisions and Policy

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

Statement of the Case

Material Facts

In June 2004, the manager of the Swan Hotel called 9-11 requesting an ambulance for Leslie Sanchez, the girlfriend of petitioner Orrie McNeill, who was bleeding from a cut above her left eye. Several police officers and an ambulance subsequently responded to the scene. The couple told police that the bleeding occurred when Sanchez hit her head on a piece of furniture while the couple was "fooling around."

While Sanchez was taken to a hospital, the officers attempted to question McNeill. McNeill told the officers that there were no other persons in the room at the time and began walking in the direction of his motel room when he allegedly attempted to flee from the officers. He was apprehended and taken to police headquarters.

The officers subsequently gained access to search McNeill's room alleging that they were concerned there was a third party injured in the room and thus exigent circumstances required a search for injured persons. Four officers entered the room and searched in a circular fashion to see if there was anyone in the room.

During the general sweep, Lt. Tempalsky saw a black backpack in the bottom of a partially open closet. He indicated that he was unable to see inside the backpack. Lt. Tempalsky further observed Ziploc bags, box from a coffee grinder, commonly used to dilute drugs, all in plain sight in the room, however, he admittedly testified that there were no large quantity of narcotics or guns in plain view during this sweep.

Based on these observations, Detective Goncalves applied for and obtained a search warrant

to search McNeill's room. At 7:30 p.m. Detective Goncalves contacted Lt. Tempalsky and informed him that he had the search warrant. Shortly thereafter, Lt. Tempalsky returned to the motel room and photographed the scene. At approximately 7:45 p.m., the officers began searching the room.

However, police tapes, phone transcripts and testimonies from the trial and evidentiary hearing strongly indicate that the officers unlawfully searched McNeill's backpack at or around 6:00 p.m. before the search warrant issued at 7:30 p.m. In a recorded conversation between Officer Padilla and Officer Tomoko, Officer Tomoko stated "They're at the Swan. They said there's probably a kilo there or half a kilo." This conversation occurred on or about 6:00 p.m.

Either at 7:32 or 7:38 p.m., Chief of Police, John E. Miliano, contacted Mayor John T. Gregori

about the recovery of "a lot of volume of heroin at the Swan Motel" and some guns. The Mayor responded that he had already been advised of the contents. When questioned whether the drugs were confiscated, the Chief indicated that "they're in the process of getting some search warrants now for I believe a storage facility and a house in Elizabeth..." Yet only one Application for Search Warrant was made for McNeill's room, the storage facility and the house in Elizabeth during all relevant time period. In other words, the Chief of Police knew the contents in the backpack even though the officers were "in the process of getting the search warrants" for McNeill's room. Moreover, this conversation took place at 7:32 or 7:38 p.m. The search pursuant to the warrant did not start until 7:45 p.m.

Proceedings Below

District Court

The petitioner was charged with two counts of heroin possession with intent to distribute, in violation of 21 U.S.C. § 841, and two counts of firearm possession in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924, pursuant to a jury trial in the United States District Court for the District of New Jersey.

On October 15, 2004, McNeill moved to suppress all evidence discovered as a result of the warrantless search of his residence. On March 28, 2005, the District Court denied both Mr. McNeill's motion to suppress and request for an evidentiary hearing. McNeill filed a motion to reopen the motion to suppress on February 16, 2006 and an evidentiary hearing was subsequently set for March 29, 2006.

Following the evidentiary hearing, the District Court denied McNeill's motion to suppress.

McNeill was tried by a jury and convicted on all four counts. After he was convicted, McNeill filed a motion for judgment of acquittal on all counts pursuant to Federal Rule of Criminal Procedure 29(c) and, in the alternative, a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The District Court denied both motions. The Court sentenced McNeill to a 481-month term of imprisonment and a five-year term of supervised release.

Circuit Court

McNeill then appealed to the Third Circuit arguing that the District Court erred in (1) denying his motion to suppress physical evidence and (2) his motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c).

On appeal, the panel upheld the District Court in a decision dated August 5, 2008. With respect to the first two counts which stemmed from the search and seizure of McNeill's apartment, the Court cited deference to the District Court in finding the initial search justified by exigent circumstances. The Panel again relied on the District Court's perception of facts in finding that the initial search was proper in scope and thus affirmed the District Court's denial of the motion to suppress. District Judge Pollak concurred and dissented in part.

On August 15, 2008, McNeill filed for a rehearing on the decision in deferring to the District Court in denying McNeill's motion to suppress. This motion was denied on December 12, 2008.

Reasons for Granting the Writ

The Fourth Amendment to the U.S. Constitution protects individuals from "unreasonable searches and seizures." U.S. Const. Amend. IV. "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without warrant are presumptively unreasonable." Brigham City v. Stuart, 547 U.S. 398, 403 (2006)(internal quotations omitted). This presumption carries over to hotel rooms, as "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office." Hoffa v. U.S., 385 U.S. 293, 301 (1966).

1. The Third Circuit So Far Departed from the Accepted and Usual Course of Judicial Proceedings by Failing to Address Petitioner's Argument that a Search Occurred before the Issuance of the Search Warrant.

In reviewing a denial of a motion to suppress, the Court has consistently reviewed the District Court's factual findings for clear error. Ornelas v.

U.S., 517 U.S. 690, 699 (1996). This Court has held that a finding is clearly erroneous when, although there is evidence to support it, the reviewing court, *upon reviewing the entire evidence*, is left with the definite and firm conviction that a mistake has been committed. Concrete Pipe and Products of C.A, Inc. v. Constr. Laborers Pension Trust for S. C.A., 508 U.S. 602 (1993)(emphasis added); Anderson v. City of Bessemer City, N.C., 470 U.S. 564 (1985); Pullman-Standard v. Swint, 456 U.S. 273 (1982). Such a mistake will be found to have occurred when *findings are not supported by substantial evidence.* Rochez Bros., Inc. v. Rhoades, 527 F.2d 880 (3d Cir. 1975)(emphasis added); Agathos v. Starlite Motel, 977 F.2d 1500 (3d Cir. 1992). Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data. Blue Bird Food Products Co. v.

Baltimore & O.R. Co.., 474 F.2d 102 (3d Cir. 1973); Rochez Bros., Inc. v. Rhoades, 527 F.2d 880 (3d Cir. 1975).

a. The Third Circuit Erred when it Failed to Address Petitioner's Argument that the Kilogram of Heroin was not in Plain View.

In the case at bar, McNeill argued in the Motion to Suppress and before the Third Circuit that the officers unlawfully searched his backpack, discovering the kilogram of heroin, before securing the search warrant. To support this argument, McNeill produced phone transcripts and transcripts of the trial and evidentiary hearing that definitively showed the kilogram of heroin inside McNeill's backpack. Moreover, Lt. Tempalsky, the officer who conducted the initial general search admittedly testified that he was "unable to see inside the backpack."

Yet, the District Court ignored these testimonies and erroneously found that the kilogram of heroin was "in plain view, as has been readily testified to." Yet, there were no testimonies or evidence to support the District Court's conclusion. The District Court ignored the testimonies made by Lt. Tempalsky, who conducted the general sweep and search pursuant to a warrant, and Detective Goncalves, who applied for the search warrant. Instead, the District Court supported this impermissible finding postulating that "if the drugs were in fact secreted so the police couldn't see them by plain view standards... there would have been no reason for the defendant to have run away from the police." Moreover, the District Court opined that "if the police were going to cook this up, I would have heard testimony that the gun was on top the TV set."

When this argument was raised before the Third Circuit, instead of reviewing the entire evidence or seeing whether findings were supported by substantial evidence, the Third Circuit failed to address this argument only opining that the District Court held a thorough evidentiary hearing without providing any further details. This issue was raised once more in the motion for rehearing. However, the Third Circuit denied this motion. Accordingly, in upholding the District Court's unsupported findings that the large quantity of heroin was in plain view, it is respectfully submitted that this Court finds that the Third Circuit erred by failing to review the entire evidence when determining whether a District Court's finding is supported by substantial evidence.

b. The Third Circuit Erred when it Failed to Address Petitioner's Argument that the Officers were Aware of the Kilogram of Heroin before the Search Warrant Issued.

McNeill further argued that the Officers and the Mayor were aware of the Heroin inside the backpack before the actual search warrant issued. During the Motion to Suppress and his Appeal, McNeill presented a phone conversation between Officer Padilla and Officer Tomoko where Officer Tomoko told Officer Padilla that "there's probably a kilo there or half a kilo." This conversation took place on or about 6:00 p.m.

Later in the transcript, the Chief of Police called the Mayor informing him that his officers uncovered "some guns and a lot of volume of heroin at the Swan Motel." The Mayor responded that he was already informed about it. In this same conversation, when the Mayor asked the Chief whether they confiscated the drugs, the Chief stated that "they're in the process of getting some search warrants now for I believe a storage facility and a

house in Elizabeth." However, the application for search warrants for the storage facility and house was the same exact application for a search warrant for McNeill's room. Moreover, this conversation took place at approximately 7:38 p.m. before the lawful search began at 7:45 p.m.

Lastly, though Officer Padilla responded to the scene and assisted Sanchez, a victim of domestic violence, he started questioning her about drugs and guns. This was noted by the District Court who pondered why Officer Padilla would ask questions about the gun even though there were no guns in plain view inside the motel room. The District Court however stated that this alone was not enough to come to the conclusion that the officers searched the room before the warrant issued.

When viewing the totality of the circumstances, these phone conversations and

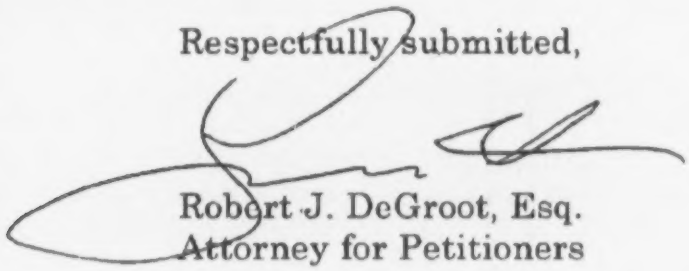
comments are strong indications that the Government searched the backpack before the lawful search occurred at 7:45 p.m. They knew the approximate quantity of heroin and the gun even though these objects were not in plain view and the search warrant has not yet issued.

Yet the Third Circuit and the District Court never considered these evidences, or at the very least, failed to address these issues that were presented before them. Accordingly, since the Third Circuit never fully considered these evidences, it is respectfully requested that the Third Circuit erred when it affirmed the District Court's denial of McNeill's motion to suppress.

Conclusion

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,



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APPENDIX

Appendix A – Order of the United States Court of Appeals for the Third Circuit Dated and Decided December 12, 2008

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 06-3746

UNITED STATES OF AMERICA

v.

ORRIE MCNEILL
Appellant

ORDER

The petition for panel rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this Court and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is DENIED.

Dated : 12/12/08

By the Court,

/s/ Thomas L. Ambro

Circuit Judge

Appendix B – Opinion of the United States Court of Appeals for the Third Circuit dated August 5, 2008

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 06-3746

UNITED STATES OF AMERICA

v.

ORRIE MCNEILL
Appellant

OPINION

Dated: August 5, 2008

AMBRO, Circuit Judge

Appellant Orrie McNeill was convicted of two counts of heroin possession with intent to distribute, in violation of 21 U.S.C. § 841, and two counts of firearm possession in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924, pursuant to a jury trial in the United States District Court for the District of New Jersey. On appeal, he

argues that the District Court erred in denying (1) his motion to suppress physical evidence as the fruit of an illegal search and (2) his motion for a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29(c). We affirm.[1]

I.

In June 2004, McNeill and his girlfriend appeared in the lobby of the Swan Motel in Linden, New Jersey. McNeill's girlfriend, Leslie Sanchez, was bleeding from the head and was hysterical. The couple asked that the motel manager call an ambulance, but requested that police not be notified. The manager called 911, and several police officers and an ambulance responded to the scene. The couple told police that Sanchez had hit her head on a piece of furniture while the couple was "fooling

[1] The District Court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction pursuant to 28 U.S.C. § 1291.

around" in their motel room, but police suspected much more.

While Sanchez was being treated and taken to a hospital, police attempted to question McNeill in the motel lobby. He was evasive and did not answer when asked if there were any other victims in his room. The officers asked McNeill to accompany them to the motel room so they could investigate. McNeill began walking in the direction of his motel room with the officers, but then fled down an alleyway. He was apprehended and taken to police headquarters. The officers then returned to McNeill's room to investigate whether there was another victim. After observing blood on the door frame and carpet leading to McNeill's room, police gained access to conduct a search. They announced their presence and then proceeded to search the motel room for victims.

What happened during the search is much contested in this appeal. Lieutenant Donald Tempalsky, one of the officers who conducted the search, testified at the suppression hearing that when the officers entered the room it was in total disarray. He testified that he observed a bag of powdery substance, Ziploc bags, and a box from a grinder, which is commonly used to dilute drugs, all in plain sight in the room. He further stated that the closet door was open a "slit" and, through the open door, officers observed a Timberland shoebox containing small cellophane bags commonly used to package heroin. McNeill, by contrast, asserts that none of these items was in plain sight.

The officers did not seize any evidence at this time, but instead secured the room and went to obtain a warrant to search both the motel room and McNeill's automobile, which was in the motel

parking lot. After obtaining a warrant, officers conducted a more thorough search of the motel room. They found over one kilogram of heroin, much of which was inside the Timberland shoebox and a black backpack, both found in the closet. Police also seized a loaded, 9mm Smith & Wesson semi-automatic handgun with a defaced serial number and ammunition. From a hidden compartment in McNeill's Ford Taurus, officers seized $2,480 in cash, a pager, a cell phone, McNeill's passport, and a copy of his birth certificate.

On the basis of what was found in the motel room and the car, McNeill was charged with one count of heroin possession with intent to distribute, in violation of 21 U.S.C. § 841, and one count of firearm possession in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924. Some months later, federal agents interviewed

Sanchez in the course of preparing the Government's case against McNeill. She told them that McNeill also had a hidden compartment in his father's Ford Explorer. The agents then obtained the father's consent to search the Explorer and found in it a compartment containing ten cellophane envelopes of heroin, a loaded .380 caliber Walther PPK semi-automatic handgun with a defaced serial number, a pager, and McNeill's original birth certificate and Social Security card. Thereafter a superseding indictment was issued, charging McNeill with an additional count of heroin possession and firearm possession.

McNeill filed a motion to suppress the evidence found in his motel room, which the District Court denied. Its rationale was that the warrantless search was justified under the exigent-circumstances exception to the warrant requirement

(namely, that the officers reasonably believed that another injured victim could have been in the motel room). McNeill then filed a motion for reconsideration. The District Court held an evidentiary hearing but again denied the motion.

McNeill was tried by a jury and convicted on all counts. After he was convicted, McNeill filed a motion for judgment of acquittal on all counts pursuant to Federal Rule of Criminal Procedure 29(c) and, in the alternative, a motion for a new trial pursuant to Federal Rule of Criminal Procedure 33. The District Court denied both motions. The Court sentenced McNeill to a 481-month term of imprisonment and a five-year term of supervised release.[2] He now appeals to us.

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[2] McNeill was sentenced to one month above the statutory minimum sentence, which included a ten year mandatory minimum on the count of possession with intent to distribute more than one kilogram of heroin, a five year mandatory minimum on the first count of possession of a weapon in furtherance of a drug trafficking crime, and a twenty-five year

II.

A. Motion to Suppress

McNeill first argues that the District Court erred in denying his motion to suppress the evidence found as a result of the initial warrantless search of his motel room. Specifically, he argues that no exigent circumstances excused the obtaining of a warrant.[3] "We review the district court's denial of [a] motion to suppress for clear error as to the underlying facts, but exercise plenary review as to

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mandatory minimum on the second count of possession of a weapon in furtherance of a drug trafficking crime.

[3] McNeill also argues that the officers cannot justify their search of the shoebox in the closet under the doctrine of "plain view." This is certainly true, as the "plain view" doctrine applies only to warrantless seizures and not to warrantless searches. *Horton v. California*, 496 U.S. 128, 133 (1990)("If 'plain view' justifies an exception from an otherwise applicable warrant requirement, ... it must be an exception that is addressed to the concerns that are implicated by *seizures* rather than searches." (emphasis added)). Here, the officers merely observed the suspected contraband in the closet, but did not seize it until they had secured a valid warrant. McNeill's "plain view" argument thus misses its mark.

However, we construe McNeill's argument bout whether the contraband was in "plain view" as an argument that the officers exceeded the scope of an appropriate exigent-circumstances search, i.e., that they continued to search for evidence of a crime after they were satisfied that there were no victims present in the room or searched for evidence that would not have been in plain sight in the course of a limited search for victims.

its legality in light of the court's properly found facts.'" *United States v. Lafferty,* 503 F.3d 293, 298 (3d Cir. 2007)(quoting *United Sates v. Givan*, 320 F.3d 452, 458 (3d Cir. 2003)).

1. Was the Search Justified by Exigent Circumstances?

"It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)(internal quotations omitted). This presumption carries over to hotel rooms, as "[a] hotel room can clearly be the object of Fourth Amendment protection as much as a home or an office." *Hoffa v. United States*, 385 U.S. 293, 301 (1966).

There are, however, exceptions to the warrant requirement. One exception is that the general warrant requirement will be dispensed with where

"'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Brigham City*, 547 U.S. at 403 (quoting *Mincey v. Arizona*, 437 U.S. 385, 394 (1978)). We have previously held that "[e]xigent circumstances exist where 'officers reasonably ... believe that someone is in imminent danger,'" *Couden v. Duffy*, 446 F.3d 483, 496 (3d Cir. 2006)(quoting *Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d Cir. 1996)(emphasis omitted)), and the police otherwise have probable cause to search, *Parkhurst*, 77 F.3d at 711.

Here, the officers had ample reason to believe that a third party could be in imminent danger. When the police arrived at the motel, Sanchez was bleeding from the head and McNeill was covered in blood, McNeill was evasive when questioned about

whether there was anyone else in his room, and, when escorted to his room to check for additional victims, he fled. When police reached McNeill's motel room, they found blood in the hallway and on the door frame leading in to the room. These circumstances make it objectively reasonable to believe that another victim could have been in the room. *See United States v. Black*, 482 F.3d 1035, 1040 (9th Cir. 2007)(upholding a search on the ground that "the exigencies of domestic abuse cases present danger that, in an appropriate case, may override considerations of privacy" (internal quotation marks omitted)).

2. Was the Scope of the Search Properly Circumscribed by the Exigencies of the Situation?

That exigent circumstances justified the initial entry, however, does not end our inquiry, as

an exigent-circumstances warrantless search must be "'strictly circumscribed by the exigencies which justify its initiation.'" *Mincey*, 437 U.S. at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 26 (1968)). McNeill argues that the officers searched the room more closely than was necessary to search for victims, and thus exceeded the scope of the exigencies present and instead conducted a general exploratory search. We take his claim to be that, had the officers limited themselves to a quick search for victims, they would not have observed the contraband that they then used as the basis to secure a search warrant, and, accordingly, all of the evidence found in the hotel room must be suppressed as the fruit of an illegal search. The Government responds that the police officers' search was proper in scope, and that any evidence they initially saw

was readily apparent to them in the course of looking for victims.

a. Understanding the Scope of our Review

McNeill identifies several contradictions in the record in an attempt to disprove the officers' assertions that the drugs and drug paraphernalia were readily apparent when the officers conducted the search for victims. He relies on both testimony from the evidentiary hearing and from the trial in support of his argument. At the outset, then, we must comment on what portions of the record we can properly review.

In arguing that the search was not proper in scope, McNeill references contradictions between testimony presented at the evidentiary hearing and testimony later presented at trial. However, the District Court, in reaching its decision on the pre-trial motion to suppress, only had the benefit of the

evidentiary hearing testimony and not the subsequent trial testimony. In this context, some Courts of Appeals have held that, when reviewing a District Court's ruling on a pre-trial motion to suppress, an appellate court is limited to the record that was before the District Court and cannot supplement its analysis with testimony that later comes out at trial. *See United States v. Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1993)("An appellate court should not rely on evidence first produced at trial to reverse a pre-trial denial of a suppression motion not renewed at trial."). Thus, where testimony at trial potentially casts doubt on the veracity of earlier testimony, the proper course is for the defendant to renew his motion to suppress. *See, e.g., Hicks*, 978 F.2d at 724; *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989)("Unless the district court is given an opportunity to correct the error [upon a

renewed motion to suppress], an appellate court cannot review evidence presented at trial which casts doubt upon a pre-trial suppression motion."). Were we to adopt this rationale, McNeill's failure to renew his suppression motion before the District Court might limit the scope of our review to the testimony presented at the evidentiary hearing and not that presented at trial.

While we are mindful of how our colleagues in other circuits have resolved this question, we find it unnecessary at this time to adopt a new rule of practice that a criminal defendant must renew his suppression motion at trial or risk limiting the scope of appellate review. This is because McNeill's claim that the pre-trial suppression ruling is undermined by potentially contradictory trial testimony fails even if we address the merits of his claim, reviewing the facts for clear error and exercising plenary

review over the legality of the search. We further believe this is a prudent course of action because the parties did not have the opportunity to address this issue fully in their briefs. We thus proceed to the merits of all of McNeill's suppression arguments.

i. Potential Discrepancies in Testimony Presented at the Evidentiary Hearing

Looking first at the record of the evidentiary hearing, McNeill argues that Lieutenant Tempalsky was not credible in his testimony about what was in plain sight in the motel room, and that Leslie Sanchez' s testimony proves this. At the evidentiary hearing, Tempalsky testified that he saw the grinder box and Ziploc bags in plain sight when he entered the room and saw the black backpack and Timberland box through the open closet. Sanchez, by contrast, testified that she had not seen any of those items when she had been in the room earlier

that morning, nor could she remember whether the closet door was open. Were we to credit Sanchez's testimony, it would tend toward the conclusion that the officers conducted a general exploratory search rather than one circumscribed by the exigency of looking for victims.

We are not reviewing this contradictory testimony with a blank slate, however, as we have the benefit of the District Court's ruling on this issue. The Court addressed the contradictory accounts of Tempalsky and Sanchez, "made individualized assessments of the credibility of each witness and assigned appropriate weight to the testimony based on [its] conclusions with respect to such." Ultimately, the Court found Tempalsky to be credible and rejected the testimony of Sanchez because it did not have confidence in her veracity.

"As we have stated[,] 'assessments of credibility by the trial court are entitled to great deference at the appellate level.'" *United States v. Givan*, 320 F.3d at 464 (quoting *United States v. Brothers*, 75 F.3d 845, 853 (3d Cir. 1996). Our review of the testimony from the evidentiary hearing leaves us convinced that Lieutenant Tempalsky's testimony had at least an indicia of reliability, and thus the District Court's determination was not clearly erroneous.[4]

Hearing and Testimony at Trial

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[4] In other portions of his brief, McNeill questions the police officers' credibility more generally, claiming that the totality of the circumstances suggest that the officers were disingenuous in conducting the search. Appellant's Br. 20-21. He cites, *inter alia*, that Tempalsky and other narcotics officers were the first to arrive at the scene of a domestic violence call, that Tempalsky did not secure the search warrant himself, and that 911 tapes suggest that the Mayor of Linden was informed that there was a large quantity of drugs in the room just minutes after the search warrant was issued. However, the District Court specifically considered each of these factors in a thorough evidentiary hearing. At the end of that hearing, the Court found the police officers and the Mayor credible. ON appeal, McNeill fails to present us with any evidence to suggest that those credibility determinations were clearly erroneous.

While the District Court credited Tempalsky's testimony at the evidentiary hearing, McNeill argues that subsequent testimony at the trial casts doubt on the Court's credibility determination. Specifically, at the evidentiary hearing, Lieutenant Tempalsky claimed to have conducted a warrantless search lasting one to two minutes. At trial, another officer at the scene during the search, Officer Evan, testified that he was present in the room for 15 to 20 minutes. According to McNeill, Officer Evan's testimony undermines Tempalsky's assertion that the search was quick, which raises the suspicion that it exceeded the proper scope of the exigencies present.

We first query whether these statements, taken in context, actually demonstrate a discrepancy in the officers' testimony. In all major respects, Officer Evan's testimony is consistent with that of

Lieutenant Tempalsky. Evan testified that he, Lieutenant Tempalsky and two other officers – Detective Fortuna and Officer Hatzelhoffer – were present for the search of McNeill's motel room. He further testified that the officers looked around the room and did not see a victim, but did observe drug packaging in an open dresser drawer and a grinder box on the nightstand. Evan testified that Tempalsky then "decided [that the officers] would have to obtain a search warrant to go any further." Evan continued: "[A]fter ascertaining there was nobody else there, I spoke with Lieutenant Tempalsky explaining that he can contact his narcotic boys. I was going to be doing [the] domestic end of this. I'd be leaving, going to headquarters after I go outside ... Also, Officer Hatzelhoffer would remain behind to secure the room until we get the search warrants." While Evan testified that he was

in the room for "15 minutes, 20 minutes, if that," he never clarified whether the actual search took that long or whether that time period also included the post-search conversations between himself and Tempalsky about who was going to take on what role in the case.

We turn to Lieutenant Tempalsky. He testified that the actual search took "[l]ess than of -- less than – maybe a minute. Maybe a minute [or] two. Maybe a minute." He then left the room with Detective Fortuna and had Officer Hatzelhoffer secure the room. Tempalsky stated that he remained "there" (presumably next to or even in the room) for "maybe a half hour" after he assigned Hatzelhoffer to secure the room. During this time, he was waiting for other officers to arrive to begin the process of applying for a search warrant.

Looking at Lieutenant Tempalsky's testimony alongside that of Officer Evan, it seems plausible that the actual search took only one or two minutes, but that the officers spent nearly 30 minutes in the immediate aftermath determining who would secure the room, apply for the search warrant, and handle the different aspects of the case. In this context, Officer Evan's testimony at trial concerning the time of the search is insufficient to upset the District Court's determination that Lieutenant Tempalsky was a credible witness.

The same is true of the other potential discrepancies McNeill raises between Lieutenant Tempalsky's testimony at the evidentiary hearing and Officer Evan's testimony at trial. Evan testified that he, Tempalsky, Officer Hatzelhoffer, and Detective Fortuna were all present for the search, while Tempalsky could only "positively recall" that

he and Fortuna were present. These statements are not directly inconsistent because Tempalsky did not state that only he and Fortuna were in the room, but merely that he knew at least he and Fortuna were there.

McNeill also highlights a potential discrepancy about who gave the officers the key to his motel room. Evan testified that the officers "located the [motel] manager" and "he gave permission to one of the maids to open the door" to McNeill's room, while Tempalsky testified that he didn't "have [an] independent recollection whether [the motel manager] handed [him] the key" or whether it came from the maid. Templaksy did testify, however, that it was "[o]ne or the other" and that he didn't "remember who it was." These two accounts are also not directly contradictory, as it is consistent that the motel manager authorized a

maid to open McNeill's room and Tempalsky, having talked to both the manager and the maid about gaining entry to the room, could not remember precisely which one provided the key. Again, we fail to see clear error in the District Court's determination that Lieutenant Tempalsky was a credible witness.

b. Reviewing the Legality of the Scope of the Search in Light of the District Court's Properly Found Facts

Having concluded that the District Court's finding that Lieutenant Tempalsky was a credible witness was not clearly erroneous, we must credit his testimony that he observed the contraband in the course of his limited search for victims. Tempalsky testified that when he entered the room to check for victims he observed a box of Ziploc bags and a small box for a grinder on the nightstand; white, powdery residue on top of the dresser; and an

open dresser drawer containing more Ziploc bags and small rubber bands. He further testified that one of the sliding closet doors was "slit" open and on the floor of the closet was a black backpack as well as an open shoe box that appeared to contain several hundred small cellophane bags, later determined to contain drugs. After ascertaining there were no victims present, the officers left the room and obtained a search warrant on the basis of the incriminating items they observed.[5]

Based on Tempalsky's account of the events, we do not believe the officers exceeded the scope of the search justified by the exigency of looking for victims. We would be faced with a very different case had Tempalsky testified that he found the

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[5] Indeed, having observed the contraband in plain view, the officers would have been justified in seizing it without a warrant. *Se Arizona v. Hicks*, 480 U.S. 321, 326 (1987)(noting that, in the course of an exigent-circumstances search, police can seize incriminating items in plain view). However, they chose instead to seek a warrant, and thus all of the evidence was seized pursuant to a valid warrant.

Ziploc bags or the drug residue in a closed drawer in the nightstand or between the mattresses, as those are not places where a victim could be. However, on the basis of the facts found by the District Court and its credibility determinations, we hold that the scope of the search was proper circumscribed by the exigencies of the situation – namely, looking for another victim of the assault that occurred in the motel room. Within the scope of this search, the officers then observed the drugs and evidence of drug dealing in plain sight. We discern no Fourth Amendment violation; thus, we affirm the District Court's denial of the motion to suppress.

B. Sufficiency of the Evidence

McNeill's second challenge on the appeal is that the District Court erred in denying his motion for judgment of acquittal on both counts of possessing a handgun in furtherance of a drug

trafficking crime and on the count of heroin possession with intent to distribute stemming from the search of his father's Ford Explorer. Specifically, McNeill contends that the Government failed to establish (1) that he possessed the heroin and weapon in the Ford Explorer and (2) that his possession of the weapons was in furtherance of a drug trafficking crime. In reviewing the denial of a motion for a judgment of acquittal, we "must consider the evidence in the light most favorable to the government and affirm the judgment if there is substantial evidence from which any rational trier of fact could find guilt beyond a reasonable doubt." *United States v. Brown*, 3 F.3d 673, 680 (3d Cir. 1993)(internal quotation marks omitted).

The evidence was clearly sufficient to show that McNeill constructively possessed the firearm and the heroin found in the hidden compartment in

his father's Ford Explorer. To establish constructive possession, the Government must show that the defendant "'knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons.'" *Id.* (quoting *United States v. Iafelice*, 978 F.2d 92, 96 (3d Cir. 1992)). At trial, the Government presented testimony from Sanchez that she had driven with McNeill in the Explorer and had seen him open the hidden compartment. She further testified that she had seen a handgun inside the compartment and that she knew McNeill carried a handgun. The Government also presented evidence that the handgun and heroin were found in the same compartment alongside, among other things, McNeill's birth certificate and Social Security card. This is certainly compelling evidence that he had

dominion and control over the contents of the compartment. Next, the envelopes of heroin found in the compartment were stamped with the same "Grand Slam" logo as the envelopes found in McNeill's motel room. Finally, in searching the motel room, the police officers found ammunition that fit the gun found in the compartment. Taking all of this into account, the evidence was more than sufficient for a jury to conclude that McNeill possessed the contraband found in the hidden compartment of his father's vehicle.

• Finally, McNeill argues that, insofar as he possessed either firearm, the evidence is insufficient to establish that he did so in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924.[6]

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[6] As amended in 1998, § 924 provides, in relevant part:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during an din relation to any crime of violence or drug trafficking crime ... for which the person may be prosecuted in a court of the United States, uses or carries a

This argument also fails. In determining whether a defendant used a firearm in furtherance of a drug trafficking crime, we look at the following factors:

> The type of drug activity that is being conducted, accessibility of the firearm, the type of the weapon, whether the weapon is stolen, the status of the possession (legitimate or illegal), whether the gun is loaded, proximity to drugs or drug profits, and the time and circumstances under which the gun is found.

United States v. Sparrow, 371 F.3d 851, 853 (3d Cir. 2004)(quoting *United States v. Ceballos-Torres*, 218 F.3d 409, 414-15 (5th Cir. 2000)). With respect to the handgun in McNeill's motel room, the evidence presented at trial established that the firearm was loaded, accessible, stored alongside heroin and drug packaging materials, and had a defaced serial number. As for the handgun in the Ford Explorer,

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firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime[,] ... be sentenced to a term of imprisonment of not less than 5 years ... 18 U.S.C. § 924(c)(1)(A).

the evidence at trial established that the firearm was loaded, had a defaced serial number, and was found with a pager and a substantial quantity of heroin that was stored in ten separate envelopes. These facts easily satisfy the requirements of § 924. *See Sparrow*, 371 F.3d at 853.

We thus affirm.

Pollack, District Judge, concurring and dissenting in part:

Insofar as the evidence presented to the jury in this case was admissible, that evidence was, as the court holds, ample to support the crimes charged. I therefore agree that we should affirm the District Court's entry of convictions on counts three and four of Orrie McNeill's superseding indictment, which both relate to materials found in the Ford Explorer titled to McNeill's father. I write

separately, however, concerning the admission of the heroin and the handgun that constitute the grounds for the first heroin-possession-with-intent-to-distribute (count one) charge and the first firearm-in-furtherance (count two) charge.

As to this issue, I agree with the court's delineation of the governing legal principles: The District Court was correct in determining that in this case the police confronted "exigent circumstances" which justified a warrantless search of appellant McNeill's motel room. Further, I agree that the fact that McNeill did not renew at trial his pretrial motion to suppress does not bar this court from addressing his argument on appeal that testimony elicited at trial undermined the District Court's rationale for denying the suppression motion. Persuasive arguments can be advanced for adoption by this Circuit of the rule of practice that

prevails in the Sixth Circuit, *United States v. Thomas,* 875 F.2d 559, 562 n.2 (6th Cir. 1989), and the D.C. Circuit, *United States v. Hicks*, 978 F.2d 722, 724 (D.C. Cir. 1993)("An appellate court should not rely on evidence first produced at trial to reverse a pre-trial denial of a suppression motion not renewed at trial."). But, as the court suggests, the adoption, or non-adoption, of such a rule ought only to be considered in a setting in which the parties have reason to know that such an issue is likely to be addressed by the court. This is not such a setting.

However, although I agree with the court's legal premises, I am not in agreement with the court's disposition of the appeal. Hence this separate statement.

I.

As the court explains, the "exigent circumstance" that called for an immediate search of McNeill's motel room was occasioned by the scene that presented itself to the police officers who came to the motel in response to the motel manager's 911 call. In the motel lobby were McNeill and his girl friend, Leslie Sanchez, the former smeared with blood and the latter, hysterical, bleeding from a head injury – an injury caused by what the police were told was "fooling around" in the motel room. Concerned that the "fooling around" might have been more serious than characterized, and might have caused injury to others still in the motel room, the police officers concluded that entering the motel room without delay to look for and assist any other injured persons was imperative. The search of the motel room yielded no other occupants and, according to Lieutenant Tempalsky, took "[m]aybe a

minute or two. Maybe a minute." But in that quick tour of the motel room Tempalsky and his fellow officers (according to Tempalsky's testimony at the evidentiary hearing conducted by the District Court on reconsidering and then reaffirming its initial denial of the motion to suppress) saw in plain a sight a bag containing a powdery substance, Ziploc bags, a grinder box commonly used in drug processing, and, through a "slit" in a closet door, a Timberland shoebox in which were numerous small cellophane bags. Armed with these observations, the police promptly sought and were issued search warrants for the motel room and for McNeill's car. In the motel room, the police found, and seized, a kilogram of heroin and a *loaded* handgun – items which in due course became the bases for the first and second counts of McNeill's superseding indictment.

As the court's opinion makes clear, the chief question at the hearing on the motion to suppress was whether, given the extent and detail of the observations to which Tempalsky testified, the "exigent circumstances" search may in fact have taken considerably longer than the minute or two to which Tempalsky testified and which, presumably, would have been all the time required to see whether there were any injured persons in the motel room. Tempalsky's testimony at the evidentiary hearing on the motion to suppress was to some extent countered by the testimony of Sanchez, who did not recall seeing the items observed by Tempalsky. The District Court, in its reaffirmation of its ruling denying the motion to suppress, following the evidentiary hearing, concluded that Tempalsky was credible and Sanchez was not.

II.

As noted above, at trial McNeill did not renew his pretrial motion to suppress. But on appeal McNeill challenges the denial of the motion to suppress and puts great emphasis on testimony elicited at trial which, in McNeill's view, calls into question the District Court's grounds for denying the suppression motion. McNeill contends that some of the trial testimony undercuts the testimony given at the evidentiary hearing on the suppression motion by Tempalsky, on whose credibility the District Court placed substantial reliance in denying the motion to suppress. Of particular pertinence, in appellant McNeill's view, is the testimony of Officer Evan that he was one of the police team, including Tempalsky, present in the motel room. Evan testified that he was in the motel room for about fifteen or twenty minutes. The court finds the contention unpersuasive:

> Looking at Lieutenant Tempalsky's testimony alongside that of Officer Evan, it seems entirely plausible that the actual search took only one two or minutes, but that the officers spent thirty minutes in the immediate aftermath determining who would secure the room, apply for the search warrant, and handle the different aspects of the case. In this context, Officer Evan's testimony at trial concerning the time of the search is insufficient to upset the District Court's determination that Lieutenant Tempalsky was a credible witness.

In similar fashion the court finds no merit in McNeill's invocation of other asserted discrepancies between Tempalsky' s pre-trial testimony and Evan's trial testimony. "Again, we fail to see clear error in the District Court's determination that Lieutenant Tempalsky was a credible witness."

My difficulty with the court's ruling – "Again, we fail to see clear error in the District Court's determination that Lieutenant Tempalsky was a credible witness" – is that, on the record before us, I

do not feel competent either to see clear error with respect to the District Court's "determination that Lieutenant Tempalsky was a credible witness," or to fail to see clear error. The District Court's determination that Tempalsky was credible was based on pretrial record with respect to which the District Court was judging Tempalsky's credibility as opposed to that of Sanchez – not as opposed to that of Evan. The deference owing to a trial court's determination of credibility is not, in my view, sufficient to instruct an appellate court to give virtually controlling weight – "not clearly erroneous" – when measuring that witness's testimony against the testimony of another witness who had not given testimony before the trial court at the time the trial court's credibility determination was made. In sum, I do not feel ready either to join, or to decline to join, the court's judgment with

respect to the first two counts in the absence of a determination by the District Court of whether its reliance on the credibility of Tempalsky would be tempered, or would not be tempered, when measured against the testimony of Evan. In order to secure such a determination by the District Court, which might in turn provide a reliable platform for this court's resolution of McNeill's appeal, I would remand this case to the District Court to conduct the inquiry I think is required.[7] *Cf. United States v. Velasquez*, 885 F.2d 1076, 1092 (3d Cir. 1092)(Stapleton, J., concurring and dissenting).

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[7] Whether the convictions on the first and second counts are upheld or set aside is no small matter. This is particularly true of the second count – the first of two use-of-a-fircarm-in-furtherance-of-a-drug-crime charges. Under the sentence now in force, the conviction on the fourth count, which is the second use-of-a-firearm-in-furtherance-of-a-drug-crime count, was required to be no less than twenty five years, because it is a "second or subsequent conviction for that offense." 18 U.S.C. § 924(c)(1)(C)(I). If the first of the two firearm convictions were set aside, it would appear that the mandatory minimum sentence for the single remaining firearm charge would be five years. 18 U.S.C. § 924(c)(1)(A)(i)

Appendix C – Opinion of the United States District Court Dated March 29, 2006

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY

No. 04-914

UNITED STATES OF AMERICA

v.

ORRIE MCNEILL
Defendant

OPINION

Dated: March 29, 2006

Honorable William G. Bassler, U.S.D.J.

The Court has, in a memorandum opinion order, dated March 24, 2005, denied Mr. McNeill's motion for a suppression hearing and then as a result the defendant's supplemental brief in a motion to reopen the suppression hearing, for reasons previously set forth on the record, I granted and

ordered an evidentiary hearing to explore what appears to be some discrepancies in the evidence that has been given to me in light of the transcript of the 911 calls and dispatch calls.

In a nutshell, the issue is whether the police did not see drug paraphernalia in plain view, but instead actually went into closets and into a clothes bag to find other drugs and a gun and then went to Judge Triarsi with a search warrant. I guess appearing before Judge Triarsi is the testimony. They did not truthfully tell Judge Triarsi they had actually conducted the search without the search warrant. So it would attack the validity of the search warrant and the testimony presented to Judge Triarisi.

I think it is a suppressed statement of law. Mr. McNeill bears the burden of proving by a preponderance of the evidence that the challenged

search and seizure was unconstitutional. See, U.S. vs. Gerrerro-Parhas, 240 Fed.3d 428, 432 (5th Cir. 2001) and U.S. vs. Walerop, 404 Fed.3d, 365. The Court in, U.S. vs. Bond, 2006 West Law, Southern District, "must be searched." In that case the defendant met the burden of persuasion and, therefore, the burden of proof that the search occurred before a warrant was issued.

Before making an observation about the credibility of the witnesses, I want to observe that in evaluating the witness of record, I have made individualized assessments of the credibility of each witness and assigned appropriate weight to the testimony based on my conclusions with respect to such. It is the only real conflict in terms of – I can't even call it a conflict in the testimony. It was between that of Officer Tembalsky (phonetic) saying that he observed the closet door open. That one of

the glassine bags was open, a number of – indicating a drug and glassine envelopes in that particular bag. As contrasted with the testimony of a witness produced by the defendant, Miss Sanchez, didn't really recall seeing any drugs.

I have taken into consideration how the government's witnesses were able to recall and describe the things they testified to, manner of the witness while testifying and, of course, what the witness said as to the outcome of the case as they in one sense of the word or whether there was any bias, prejudice, concerning any of the testimony from a party. Granted there's always some discrepancy in the testimony. Seems to me that the entire presentation of the case on this issue from the very beginning to the bitter end here at five o'clock is perfectly consistent and while initially I had some reservations based upon what I pointed out earlier;

that is, what is the conversation between the chief and mayor that afternoon? How that could have possibly taken place when the search warrant has been issued later, to my satisfaction that has been resolved.

I've taken into consideration how reasonable the witnesses testimony was, considered in light of all the evidence, Procedural Practice Section 2585 (1955), Miller vs. Mercy Hospital, 820 Fed. 2d, 526. Section 470, U.S. 1083 (1983).

I recognize that the Courts, in the Miller case, credibility involves more than a witness's demeanor, comprehence overall evaluation, testimony, in light of the rationale or interim needed to the manner which it hangs together with other evidence. And whether the witness's testimony was contradicted by what that witness has said, done, in that time or by the testimony of other witnesses or by other evidence.

I can't put my finger on it, but I do recall reading the transcript where that was an observation made of Miss Sanchez's condition when they took her to the hospital. My recollection of it was that she was wired, wasn't wired as indicated that she had been using drugs. I just can't put my finger on the observation but what is clear from the transcript and which I have clear recollection of, is that the scene in the hotel room was one of violence and agitation; broken phones, blood on the floor. So, at this stage of the game, it doesn't give me any confidence in any of what she had to say here this afternoon. So, aside from that, there is no testimony that contradicts what the government has just pointed out in any of the testimony of these witnesses.

For me to suppress the evidence and for me to conclude that the search warrant was phony, I have to disbelieve the testimony of the government witnesses. I want to make it perfectly clear that I am not drawing any adverse inference from the defendant not testifying at the suppression hearing. I'm simply indicating that by not testifying the

defendant here has failed to contradict the government's evidence with his own testimony. See, Austin vs. Mullins, 536 Fed.2d, 1998 (7th Cir. 1976). See also, Raheem vs. Kelly, 1983, Subsection 395, 2000 at page 317. As in that case I did not draw an adverse inference from the defendant's failure to testify.

I am focusing, however, on the testimony of, presented by the government witnesses. A review of the testimony and for some reason that escapes me, why the government does not want to include the 911 transcripts in evidence. The testimony, substantially the testimony here substantially corroborated by the comments of the police officers at the time of the entire incident. I find the testimony of the police officers credible, as well as that of the mayor.

If that is the case, then it is not something that I was originally concerned about, that there was evidence in front of me that the search had actually taken place before the search warrant was issued. Simply no evidence to support that and there's been absolutely no reason for me to call into

question the credibility of the police officers. No law has been given to me that the search is invalid after it's conducted pursuant to a search warrant simply because the search took place before the officers had a search warrant in hand. There's no indication here that this stuff was found in the hotel room that doesn't correspond within the parameters of the search warrant.

I also question, in terms of evaluating credibility of the government's testimony, the defendant's position on this issue. For example, in observing Mr. McNeill's facial expression while the police were testifying I could see that he took umbrage of the testimony that some of the drugs were at, left in plain view. The argument originally presented to me was that the police were not in the motel room legally and if they were not in there legally, then what evidence they viewed as not a legal exception to getting a search warrant.

In fact, Mr. McNeill, in his affidavit of December 26, 2004, where he acknowledges that Miss Sanchez sustained injury to her face and did not consent to a search and

questioned the police, never asked him about another person being in the room. The entire thrust of Mr. McNeill's statement under oath is not a denial that there was a gun in the room. There's no denial that the drugs were found in the room and there is no test to set forth the police could not have seen any drug paraphernalia because they were secreted in the closet where no one could have seen that. Instead, the whole thrust of Mr. McNeill's position is that the police were not there legally.

In the previous opinion that I rendered in this case I had, without any hesitancy, come to the conclusion that nothing in the evidence of Mr. McNeill and nothing in the record in any way undermines the police testimony that they originally were on the scene because of the domestic violence matter and that they originally entered the room under the circumstances which they testified to. Which was a perfectly reasonable explanation of the entry. Even if they had in the back of their minds motive for going into the motel room,

certainly they would have been perfectly within their duty had they not gone into the hotel room.

The issue then is, when they went into the hotel room, did they see what they testified to what they say they saw and that had never been contradicted. If you read carefully the testimony and listen to the testimony given today, it appears to me the police are telling the truth. They did stop what they were doing. They did go and get a search warrant. If the police were going to cook this up, I would have heard testimony that the gun was on top the t.v. set. Now, the argument is made by Mr. DeGroot, cogent argument, but I just don't think it's a valid one. It would have been easier if head support. He would have included that piece of information as well with the testimony presented for argument.

If the drugs were in fact secreted so the police couldn't see them by plain view standards if that were the case, there would have been no reason for the defendant to have run away from the police. He would have known that

on a search of the place the worst that could be found are a couple broken telephones but no one would be able to, without a search warrant under those circumstances, go into a closet and begin rummaging around.

It's also worth noting, I think, that the evidence and the brief as I indicated earlier focus on there being consent and because there was no consent, that anything in plain view would have ended the search. Plain view in the search was illegal which, of course, is true. Only after I ruled consent wasn't necessary do we then see the argument that there is this discrepancy between the record that somehow undermines the ability of the search warrant.

The argument was not that they couldn't have obtained a basis for the warrant, but the police were lawfully there in the first place. The argument that be reference to at least a kilo, somehow that thoroughly undermines the government's case is an argument but I just don't find it persuasive. If, in plain view, as has been readily testified to, there was an eye-ball on what was there, maybe it's a stretch

to say they could have eye-balled a kilo and a half, but that alone, in my opinion, doesn't warrant a suppression.

To test the argument about the Padilla testimony, to the affect that his information had to have come before the search, isn't necessarily so. That information could have easily again come from what was observed in plain view. The argument as noted about the weapon shouldn't have been about the weapon, so why does Padilla ask the questions about the weapon? Again, a good argument, a good question. But it isn't enough for me to come to the conclusion that this whole story is hooked-up by the police after they in fact go a search arrant.

It seems to me ironic that so many times we are criticizing the police for getting a search warrant, but here where the testimony is that after what was seen in plain view the police stopped the search and went and got a search warrant, it seems really bazaar to me under these circumstances. The police testimony telling exactly what they did should be totally disregarded and the search declared

invalid. If the police meant to cook this whole thing up, which I don't believe they did, this doesn't seem the way that it would have been done. I think that covers everything.

Except to add, that having seen the state of Miss Sanchez and having seen the grinder and having seen the Timberland box with the glassine envelopes, the police certainly realized they had more than just a minor player here, and we all know where there's drugs, there's often guns. So, it wasn't such a bazaar question to ask and you could ask yourself in argument on the other side of the fence, if they knew the gun was there, why did they have to ask the question in the first place.

In any event, I'm satisfied that even if the burden were on the government, which I don't think it is, even if it were on the government, I find credible the testimony of the government witnesses and as a result, as a matter of law, I find that the suppression motion should be denied.

I'll see you tomorrow at ten.

(Court adjourned.)